UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
KLEEBERG, et al.,	:	Docket #1:16-cv-09517-LAK-KHPGWG
Plaintiffs,	:	
- against -	:	
EBER, et al.,	:	New York, New York March 5, 2021
Defendants.	:	
	:	TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE JUDGE KATHARINE H. PARKER,
UNITED STATES MAGISTRATE JUDGE

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E X A M I N A T I O N S

E X H I B I T S

THE CLERK: Calling case 16 civil 9517, Kleeberg vs. Eber; the Honorable Katharine H. Parker, presiding.

Beginning with counsel for the plaintiff, can you please make your appearance for the record?

MR. BRIAN BROOK: Yes. Good afternoon. Brian Brook for all plaintiffs.

MR. COLIN RAMSEY: Colin Ramsey from Underberg & Kessler for the Eber defendants.

MR. PAUL F. KENEALLY: Paul Keneally, Underberg & Kessler, also Eber defense. Thank you. Good afternoon.

MR. JOHN C. HERBERT: John Herbert for the Lester Eber Estate and Wendy Eber.

MR. DANIEL P. O'BRIEN: Dan O'Brien for the intervenor, Canandaigua National Bank.

THE HONORABLE KATHARINE H. PARKER (THE COURT): Okay, very good. Welcome, everyone. I hope everyone and their families are doing well. We are still amid the COVID crisis, although there is a light at the end of the tunnel. And I want to remind everyone that I'd like you to keep your phones, on mute unless you're speaking, to eliminate background noise.

The Court's making an official recording of this oral argument, and you can order a transcript within three days of today. Please state your name before speaking for

the benefit of the court reporter who may be asked to transcribe the conference.

This line is open to the press and public on a listen-only basis. And I want to remind everyone on the call that the Court prohibits recording and rebroadcasting of court conferences. Violations of this rule may result in sanctions.

We are here because there is a motion for reconsideration of my decision on the Motion for Summary Judgment. And the motion was a motion for partial summary judgment, so the parties were always contemplating going to trial as to some of the issues. And my decision put more of the issues on track for trial than resolution on the papers. But the parties have raised some concerns about that decision, and I have some questions for the parties about that. So I wanted to first -- and I previewed some of the questions in order to help you prepare for today. And so I am looking forward to hearing from you on these issues.

Mr. Brook, I want to start with you and understand your arguments. One of these is is that there was no Motion for Summary Judgment on Count IV of the Complaint. And so I wonder whether there needs to be briefing on that count or on elements of that.

MR. BROOK: I don't believe so. And I think the reason why is -- so the reason why Count IV wasn't specifically sought for summary judgment was because there is an intent element to that statute. But it doesn't change the fact that we are also seeking to set aside the transactions in Count I. And that is something that, you know, Courts have done; that is, you know, a breach of fiduciary duty, that has a standard remedy, you don't need a statute for that. So in some sense, I was really, you know, sort of just doing a backup by including that statute and showing that there is additional authority for unwinding the transactions besides the common law of fiduciary duty. So I don't think that affects any of the relief that we are requesting here, if that makes sense, your Honor.

THE COURT: And if the Court were to unwind the transfer to Alexbay, there are still issues that remain for trial, are there not?

MR. BROOK: Yes, there are some. And I went carefully through the Complaint in response to your Honor's question, and I reviewed the transactions. I think how much is left for trial really depends on the second issue that we presented in our Motion for Reconsideration, which is ensuring that my clients are recognized as the rightful

shareholders of Eber Brothers & Co., and, you know, having appropriate relief entered to ensure that they're able to exercise those rights without interference. And if that happens, I actually believe that a lot of the claims, in particular the transactions that we seek to set aside, don't need to be addressed by this Court because my clients with control of the corporations will be able to engage in self-help essentially, to -- you know, with control of the corporation, you can set aside transactions.

THE COURT: So take me through those alternatives step by step, what your thinking is on that. If the Court were to unwind the Alexbay transfer, place that in a constructive trust, what is left if -- with either alternative as to the claim regarding they're being recognized as shareholders?

MR. BROOK: Yes, your Honor. So if the claim that they're recognized as -- and the fact is legally, you know, there's a lot left. But what I'm saying is that I believe, your Honor, that we would be willing to essentially drop some of them and proceed to engage in self-help. So, for example, trying to set aside the investor's purchase of preferred shares in 2017. So that's something where with control of the corporation you have the ability to cancel out that transfer, and then the onus would be on Lester

Eber's estate to try and challenge that in a court, if they chose to do so.

THE COURT: Okay. But let me -- I want to just go -- take me through step by step, because there's a lot of transactions that you're talking about unwinding, Mr. Brook.

MR. BROOK: Yes.

THE COURT: And so the transfer to Alex -- so there's one thing winding back the transfer from Alexbay, but then you've got a whole bunch of transactions where ownership in the Connecticut entity, there are nonparty entities that have some ownership in that entity and who would be impacted by this. They're not here. And then --

MR. BROOK: You're talking --

THE COURT: -- if you go back further, which I mean, you're going back and back and back, so what is the impact on these others? What issues are left? So wind it back for me step by step and what would be left to be tried as to those other transactions.

MR. BROOK: Sure. Well, let me address first the issue of nonparties invested. So the only nonparty that has an interest in the Connecticut entity, either Connecticut LLC, is Eder Goodman, E-d-e-r. And that would not be impacted at all here because none of the transactions that

we're seeking to alter or set aside involve something that Eber-Connecticut did. Instead, all the transactions that we've focused on are either at Eber Metro or Eber Bros. Wine & Liquor or Eber Bros. & Co., Inc. levels. And for those companies, only parties are interested in it. And so that is not an issue. So there's nothing with Eder Goodman being an interested party that would affect anything because we aren't asking the Court to set aside any transactions that engaged in.

The closest that we have that even touches on it is actually a transaction that involves Eber-Metro, and that is the transfer of shares to Wendy Eber by Polebridge-Bowman. Those were shares in Eber-Connecticut. But that has already happened, so, you know, Polebridge-Bowman already transferred those shares to Wendy Eber, and we argue that the transaction where Polebridge-Bowman initially got the shares was a sham in and of itself. And that is a transaction where, likewise, I believe that with control of the company -- we don't actually need a court of law to rule on that -- because with control of the company you can decide that a transaction does not have economic substance and essentially, you know, restate your books to correct what was an error. And that is the approach that I think would be most efficient here.

Now, certainly, you know, I think it is possible that it will at some point need to be adjudicated, but it doesn't necessarily need to be adjudicated by this Court even though legally those claims would still be, you know, present. What I'm saying is, you know, we can drop those where we have control.

The one exception for all the trans -- there's a couple -- let me focus on the transactions that we would still need a ruling from this Court on.

THE COURT: Thank you.

MR. BROOK: One is the consulting fees to Lester by Southern Wine & Spirits. Now, that is something that predated the Eber-Metro transfer to Alexbay, and so it's not impacted by setting aside that transaction at all. There is also the -- a lot of the stuff in here, like the preparatory transactions, a lot of that is just pleading our case to show how bad the facts are. So we don't need rulings on that if we get the transactions set aside on the no-further-inquiry rule. Another exception is Slocum of Maine because that is an entity that is not in the Eber-Metro or Eber Wine & Liquor chain of families because what happened there, you know, is that Eber-Metro owned a call option to buy that company. And it exercised that option but then, instead of taking ownership itself, the shares

were simply granted to Lester and Wendy Eber in their individual capacities. So that is one where just having control of Eber-Metro would not allow us to ensure the continuation of the business in the manner that works, where this Slocum of Maine entity is involved in the importing of foreign wines, is my understanding. So that is one thing where it would need to be adjusted.

And because that transaction occurred --

THE COURT: Are you saying the Slocum of Maine issue would have to be addressed by the Court?

MR. BROOK: It would because we don't have -- because we would not be able to take that back ourselves. Right? The registered shareholders are different people; and my clients, having control of Eber-Metro, would not automatically get control of Slocum of Maine back. But because the transfer of the call option to Lester and Wendy Eber occurred during the constructive trust period, your Honor, really that is something that I'm not even sure we would necessarily need a trial on because part of imposing the constructive trust is seeing what transactions occurred after the transfer that now need to be unwound because they would have been wrongful if it had still been owned by the trust all along. So it's --

THE COURT: Okay, but Slocum of Maine is not a

party.

MR. BROOK: Yes, it is, your Honor. It was added as a party in the Third Amended Complaint.

THE COURT: Okay. So you're saying that as part of the -- so they are part of the Eber defendants?

MR. BROOK: Yes, yes, I believe that's right, because it is owned 50/50 by Lester and Wendy Eber.

THE COURT: Okay.

MR. BROOK: So other than those two things, the only other -- those are the only two transactions where I believe we would need a ruling of some kind by this Court. And I'm not sure that it would -- for the Southern consulting fees, I believe that does have to go to trial because it's not something that would fall within the Court's equitable jurisdiction of imposing a constructive trust. But the Slocum & Sons of Maine one probably would not need to go to trial, per se, if a constructive trust is imposed.

But other claims for trial, your Honor, would be Count II, the faceless servant doctrine, and whether some of the salary that was paid needs to be refunded to the company because they were disloyal to the company.

And also then two other claims, Count VIII, aiding and abetting breach of fiduciary duty and fraudulent

concealment against Wendy. You know, we would not pursue the fraudulent concealment count against Lester Eber's estate, mainly because I think the only thing we would have to gain there, if the Court goes ahead and unwinds the Alexbay transfer, is punitive damages. And, generally speaking, punitive damages are exceedingly hard to get against an estate. So we would just let that go. But Count VIII against Wendy we would like to pursue.

And then, finally -- and Mr. O'Brien is on the line -- he'll be glad to say that the equitable indemnification claim, Count X, is another one that would need to be addressed.

THE COURT: Okay.

MR. BROOK: So is there another part of the question, your Honor, that I still have yet to cover?

THE COURT: No, I don't think so. So in terms of the 2012 foreclosure, there's the -- there are two issues with the transfer. There's the loan, and the will documentation, trust documentation permitted Lester to make the loan; and it permits the putting up of collateral. And then there's the separate question of the foreclosure that happened in 2012. So what duties are you saying Lester owed to your clients, Mr. Brook, at the time of the foreclosure and transfer?

MR. BROOK: Sure, your Honor. So there are two sets of duties. One is because this was, you know, done by a corporate officer, you know, the usual corporate fiduciary duty of good faith and duty of loyalty, those both applied here. But the more fundamental one that we're talking about is the duty of undivided loyalty that is implicit in every trustee relationship unless the trust instrument explicitly says that it is creating an exception and lowering the standard to only good faith.

THE COURT: Okay. Lester --

MR. BROOK: So that duty applies here.

THE COURT: -- Lester was, he remained the trustee of the trust during the entire period?

MR. BROOK: Yes.

THE COURT: So he was, as of the time of the transfer, he was trustee of the trust, but he was not an officer of EBWLC or EB Metro, is that right?

MR. BROOK: I believe he was of Eber-Metro, and he was of Eber Bros. & Co., Inc., which owned Eber Bros. Wine & Liquor Corp. But you're right, your Honor, there was a purported resignation by Lester Eber at some point in time in 2012 prior to the transfer being formally documented. I don't believe --

THE COURT: Of Eber --

MR. BROOK: -- that affects anything.

THE COURT: Of Eber-Metro?

MR. BROOK: Of Eber Bros. Wine & Liquor Corp. And that appears to have been done because they recognized that there were fiduciary problems with him seeking to foreclose against the company where he was, you know, CEO and president. So --

THE COURT: Right. This --

MR. BROOK: -- but that doesn't affect the duties as trustee.

THE COURT: So I guess that's my question here because he had three hats initially, right? He had the trustee hat, where he had fiduciary obligations. He had the EBWLC officer hat, and then he had the hat as officer of Alexbay. At the time of the transfer, he had the hat of Alexbay and the hat of the trustee but not the hat of EBWLC. So he did not sign off on the transfer. So does that make a difference legally, as a matter of law, in terms of the breach -- how does that -- when he did not agree to the transfer on behalf of EBWLC?

MR. BROOK: It doesn't affect it at all, your Honor, from the perspective of trust law because he was still a trustee who was taking ownership of trust property. And that is what is subject to the no-further-inquiry rule.

It doesn't matter if he sets up, you know, a completely independent third party who's not his daughter to sell Eber-Metro to his Alexbay. That would not affect the fact that he is still purchasing trust property without the consent of the beneficiaries or the authorization of the trust document. So the fact that he took off his corporate hat, probably on the advice of counsel, didn't change the fact that he owes a much stronger fiduciary to my clients through his role as trustee. And that's really all that matters here. And he wasn't terminated as trustee until 2017. So --

THE COURT: Right. And so what --

MR. BROOK: -- throughout the relevant period, your Honor.

THE COURT: -- what -- and does his fiduciary -- does the trust ownership, direct ownership of shares in EBWLC, impact this analysis, in your view?

MR. BROOK: I would step back and say this, just to clarify things. So -- because there's a little bit of confusion as to whether the trust owns shares directly in EBWLC. We have received --

THE COURT: Right.

MR. BROOK: -- two different sets of conflicting records. That doesn't matter, though, because even if,

let's say -- certainly, if EBWLC shares were owned directly by the trust, there would be no question it's a direct ownership interest. But even if there are none, it still has an indirect but complete control interest in the EBWLC because it completely owned Eber Bros. & Co., Inc., which in turn owned all of the voting shares in EBWLC at the time of the transfer. So with complete control --

THE COURT: Do you have a case that involves a scenario where it's an indirect interest?

MR. BROOK: I don't have one where there's two layers of corporations, your Honor. But, you know, I think that this is easy to resolve because there's no doubt -- and I do have a case saying that having just a majority of voting stock by a trust is enough to have the breach of fiduciary duty rules come into play, and that is *Renz v. Beeman*, Second Circuit 1978. So that was just ownership of a majority of voting stock. There were other stockholders, as well.

But think about it this way, your Honor. If you have fiduciary duty, the fiduciary duty of undivided loyalty for a corporation that's directly owned but you didn't if it was one layer removed, then why wouldn't any faceless trustee just create another entity, you know, and transfer all the assets into that and put two steps between

them -- boom, you know, they get to wipe their hands and say, "I don't have the fiduciary duty of undivided loyalty anymore"? It would be a gaping loophole in the law allowing form to preside over substance. And that is not how the law is or should be.

So the fact that we don't have a case that specifically dealt with the one-step-removed transaction I don't think should -- you know, the Court should not create new law and say that that is somehow a defense, and particularly not when the defense itself has not raised that issue with the Court. So I don't think there was any question between the parties in the briefing that the duty of undivided loyalty was at least generally applicable to this transaction. The dispute, your Honor, was focused on whether he had a defense to that by saying that the will authorized the transaction.

THE COURT: Okay. How does the trust ownership interest in EBWLC impact the share distribution ordered by the surrogate court, if at all, in your view?

MR. BROOK: I don't think it impacts it at all. What that means, your Honor, is what I was saying at the beginning of this argument, which is the thing that's important is that once those shares are distributed in fact to my clients, what it means is they will have effective control

over EBWLC. So as long as the relevant assets are returned to EBWLC, my clients will be able to exercise substantial control over that without needing to turn to judicial intervention, you know, because at the end of the day, the way that corporate law works in the real world is that corporations, you know, do what the people in control want, and it's the people with the minority interest who then have to go to court and ask for relief. And when we started this lawsuit, we were effectively like a minority because we were trust beneficiaries and therefore lacked control despite having a beneficial interest that was a majority interest. But now that the trust has been terminated and once the shares are recognized, my clients will no longer be in that position.

THE COURT: Okay. And with respect to the surrogate court order distributing the shares, what authority, if any, do you believe this Court has to act on that ruling? In other words, the surrogate court --

MR. BROOK: I understand, your Honor.

THE COURT: -- authority ruled and required that distribution.

MR. BROOK: Yes, your Honor. But it only required it of the parties to that surrogate court's action. And Eber Bros. & Co., Inc. was not a party; it was instead an

asset that was being distributed. And that's what this Court has jurisdiction over. Eber Bros. & Co., Inc. is a party to this action, and the problem that we have now is not that my clients don't have the right to the shares; it's that when the Eber in control of Eber Bros. & Co., Inc. has refused to recognize my clients as the rightful shareholders and instead it's been held up. So what this Court has jurisdiction over is, as a matter of corporate law, to direct Eber Bros. & Co., Inc. to recognize my clients as the shareholders and to impose appropriate equitable relief to ensure that their rights as shareholders are recognized by the company.

THE COURT: Okay. Okay. Now, another question for you with respect to this defense of consent. The defendants have raised various defenses, including that there was no breach of fiduciary duty. Why is this consent issue not subsumed within the missing defenses, in your view?

MR. BROOK: I think it's missing because of the distinction between affirmative and negative defenses. So let me just -- I looked at this, and I'll just -- for frame of reference, *Black's Law Dictionary* says an affirmative defense is, "a defendant's assertion raising new facts and arguments that if true will defeat the plaintiff's or the

prosecution's claim even if all allegations in the Complaint are true." So that is what makes this different. So what is labeled an affirmative defense is really not. So that's the first and the fourth are both negative defenses; they merely state that the -- especially the first one, that there's no cause of action for which relief may be granted. That's attacking the sufficiency of the allegation. You know, on a legal ground it's not asserting new facts that if true would negate any of the claims.

The only one -- and I think that's -- and you also asked about the 15th defense, which was Lester Eber had no fiduciary duties as trustee following the surrogate court's termination order. That's not applicable to 2012 because that happened in 2017. So the only affirmative defense that the defense has even argued could subsume the defense of beneficiary consent is the third one where they say that the cause of actions are barred by the doctrines of waiver, laches and/or estoppel. And those are all fairly established common law doctrines, and none of them involve beneficiary consent. And, certainly, as we briefed, you know, the notion of consent is simply different than waiver in a lot of ways.

So there's certainly no allegation that my clients consented to a transaction. That would be the fact. You

know, and I looked at the case law and, you know, affirmative defenses aren't required to meet the standards of pleading of Iqbal and Twombly, but they're still required to meet the notice pleading standard. And just as a matter of basic common sense, there's nothing in here that at least certainly I interpreted as asserting a consent defense.

And I think ultimately, your Honor, though, it doesn't really matter whether they alleged it earlier or not because failure to allege an affirmative defense in the Complaint is something that this Court could grant some discretion to -- you exercise discretion to allow them to cure if they tried to present --

THE COURT: Right, right.

MR. BROOK: -- it at summary judgment and there was no prejudice. The problem, your Honor, is they never presented this defense, even at summary judgment; and in fact, explicitly said we are not raising this defense. So, you know, and I do apologize, your Honor, I don't normally do this, but in this instance I thought I'd -- you know, it's not exactly laying a trap but sort of doing that -- so I didn't mention that quotation in the opening brief from their reply brief when they denied it, just to see what would happen. And then sure enough, they said we asserted

this defense, and then I pointed out they actually said Lester Eber -- you know, quote, "Lester Eber does not argue that he sought, received or needed plaintiffs' consent at the 2012 foreclosure." That's their -- that's Summary Judgment Reply Brief at 10. So they were contending there was no duty to inform the trust beneficiaries.

So, you know, so for this Court to order a trial, there has to be some dispute of material fact so that a reasonable juror would possibly find that there was beneficiary consent. And it's hard to imagine how that could be when they did not present any such facts and in fact, if we had a trial, I could read this statement, this admission by them into evidence as an admission by party opponent that would severely undermine their credibility.

So I think it's basically -- you know, putting aside the arguments that we made in our brief about how there are no facts sufficient to justify this because there's nothing that actually constitutes consent, you know, there's an affirmative responsibility on the part of the nonmovant in summary judgment to present facts and arguments that would establish a defense. And that was a complete failure of that here, your Honor. So there's no need for a trial in this case. And I hesitate to think, you know, what a jury would think if we wasted their time

with that.

THE COURT: Okay. Are there other points you wanted to make, Mr. Brook?

MR. BROOK: I don't believe so, your Honor. I think I addressed all the Court's questions. You know, I would ask for the opportunity to briefly reply at the end of the argument if there's something that comes up that I feel the need to do so.

THE COURT: Okay. I'd like to hear next from the Eber defendants.

MR. RAMSEY: Judge, this is Colin Ramsey. If you remember from summary judgment, John Herbert and I kind of split up the issues. So depending on which one you'd like to hear from first, John or I will address whatever the Court wants to tee up.

THE COURT: I don't have anything in my mind. Why don't you start, Mr. Ramsey, and we'll take it from there?

MR. RAMSEY: Yes. I could start where we ended with Mr. Brook on the consent issue. There continues to be, I think, a fundamental misunderstanding of what we're arguing. He's technically right when we say that we've maintained that Lester didn't need to seek consent in 2012 for the foreclosure. And the reason was what happened two years prior to that, which from the beginning we have made

one of the cornerstones of our defense, that Lester afforded the plaintiffs the opportunity to participate in the loans, provided him with all the loan documents that the Court indicates in its decision. And that's where the consent flows from, what happened was it two or three years prior to 2012. So --

THE COURT: Right. You're saying that there was prospective consent because the foreclosure was part of the documentation provided by Lester to his sisters --

MR. RAMSEY: Exactly.

THE COURT: -- aunts.

MR. RAMSEY: Exactly. So --

THE COURT: I understand that to be -- I've understood that to be your argument for the entirety of the case.

MR. RAMSEY: Okay. Very good. Very good. I just want to make sure that there was no confusion about what we were arguing because --

THE COURT: But I do want to press you on this, though, because what Mr. Brook has said is that you really have to have a separate consent at the time of the actual transfer because of the fiduciary obligations that Lester still had as trustee. And so -- and he is initiating, essentially, this issue, he's initiating the transfer in a

sense because he is deciding to foreclose and accept -- and on behalf of Alexbay accept the transfer. So what do you say to that; is a second consent required to actually have this transfer rather than, say, a public auction. And if not, why not, and what case would you cite me to on that?

MR. RAMSEY: Well, in our view, no. The initiation of the consent that occurred, again, occurred back in 2010, when the plaintiffs were aware of or were given the opportunity to participate in the loan and whatever the terms would be. And one of the terms or one of the conditions would be that, you know, what happens if there's a default. And so they were aware what could have happened or what would happen in 2010. So the need to go back and get, you know, an additional consent in 2012 was, in our view, superfluous.

I'm not sure -- and I know we don't have a case exactly on those facts, your Honor -- but that's been our position all along is, again, it would be superfluous to do it in 2012, when it was already teed up two years prior.

MR. HERBERT: Right. Colin, can I add to that?

THE COURT: So why not -- why not give them -- why not give them notice of the foreclosure proceeding?

MR. RAMSEY: Well, the statute didn't require it I think is the short answer, Judge. That's the short answer.

THE COURT: And -- okay. And with respect to the consent in 2010, Mr. Brook also makes the argument that there really can't be a factual dispute because there's no affirmative document where his sisters say, yes, go right ahead. There's clearly -- there's no dispute that they received these papers; they knew that the loans were being -- I don't think that there can be any dispute that they were well aware that Lester was giving money to the entity and that they were given notice of the terms of the loan. But there's no affirmative objection to it; there's also no affirmative consent. I think what Mr. Brook is arguing is that under the case law, you don't need -- that you actually would need something affirmative. What do you say to that?

MR. RAMSEY: Well, I think that's where the question of fact is. I don't know that the case law says absolutely absent some written document saying, "I hereby consent to X, Y, Z," you can never find consent. And I think that's where we have the question of fact that the Court highlighted in its decision, saying okay, plaintiff says this, defendants say that, this is for the trier of fact to ultimately determine.

THE COURT: Okay.

MR. HERBERT: Colin, can I add something to this?

MR. RAMSEY: Sure, John. Go ahead.

MR. HERBERT: Yes. John Herbert. I think one of the reasons why you don't see any case where, you know, you have a preexisting loan that went into default and the creditor tried to get the consent of beneficiaries of the trust that own the borrower company is that it wouldn't make any sense. You know, of course, if the loan has been made and a couple of years go by and the loan goes into default, I mean, if you asked the equity holders of the borrower to consent to a foreclosure of its security, well, obviously, they're not going to give it to you. So nobody would ever do that. So that's why the whole transaction, any loan transaction, the whole transaction is all bundled into one set of documents. It provides for the making of the loans, the repayment of the loans, you know, the specific consideration for making the loan and provides for what happens if you don't pay; in other words, how do you -- you could foreclose on the collateral. And that's what happened here.

And I think there's a whole 'nother layer here that I think was addressed in your question number three, is who could have consented to the foreclosure. I mean, what actually happened here was that, you know, Lester believed that the trustees of the trust were the appropriate people to consent, in effect, right. So this is a different situation here than -- this is not a loan to

the trust where the trustees would have had to act at the front end of the loan transaction. This is a loan to a company owned by the trust. Right? So here the consents, Lester sought the ratification of the loans, the loan package, from the nonconflicted trustees. Remember, he's not the only trustee; there are three trustees here. So he concluded that the right place to go for ratification of the loans and his rights was to the other two trustees.

Canandaigua here, clearly independent, they were, you know, a bank, they're experts in commercial lending and in creditor's remedies in the case of a default on a loan. In fact, they had their own loans outstanding with the company throughout this entire time. They knew about the loan, they knew about the collection provisions in the loans and that they were all part of one package. They knew about the deteriorating condition of the business. So there were a number of conversations between the Ebers and the two other trustees about ratifying a loan. And there was a meeting of the trustees on August 18, 2011, where they very clearly went over the provisions of the loans, the status of the loans, the fact that the beneficiaries had been given an opportunity to participate in the loans and declined to and that the two trustees, they ratified the loan. And that document -- the Bates number is

CNB00030. Nobody is contending here that there was anything defective about that ratification at all. I mean, it seems to me that's what's the most important thing here is that the majority act here, the majority act of two of the three trustees is adequate to bind the trust under EPTO 10-10.1. And Lester wouldn't have gone forward with the foreclosure if he hadn't gotten that ratification.

THE COURT: I see. So your sense is that the trust -- that the beneficiary consent is really not pertinent here when you have the two independent trustees of the trust agreeing to the foreclosure and transfer?

MR. HERBERT: Right. And, you know, it could be if you could get it, but obviously you're not going to get it from the beneficiaries. Here the trustees --

THE COURT: I see.

MR. HERBERT: -- or the trust itself with the controlling shareholder of Eber Bros. & Co., Inc., they owed a fiduciary --

THE COURT: And --

MR. HERBERT: Sorry.

THE COURT: Okay. And they owed a fiduciary duty to the beneficiaries, as well?

MR. HERBERT: No. They owed a fiduciary duty as the controlling shareholder to the minority shareholders of

Eber Bros. & Co., Inc., hence the minority shareholders of Eber-Connecticut. And if -- you know, that was the --

THE COURT: I'm get --

MR. HERBERT: -- right place to go.

THE COURT: So I'm getting confused here. The bank was a co-trustee of the trust --

MR. HERBERT: Correct.

THE COURT: -- which was the owner and indirect owner of the various Eber entities?

MR. HERBERT: Correct.

THE COURT: And what you're saying is the two independent trustees approved and ratified the foreclosure and transfer?

MR. HERBERT: Well, they ratified the loan package, which included the security agreement, which very clearly provided that Lester could foreclose in the manner that he did foreclose.

THE COURT: Okay.

MR. HERBERT: It was another six months before he actually did foreclosure.

THE COURT: But those trustees have a fiduciary obligation to the trust that flows to the beneficiaries, right?

MR. HERBERT: Well, they have a duty, fiduciary

duty, to the beneficiaries of the trust, and as the majority shareholder of the Eber companies, they have a fiduciary duty to those companies, too. So those are the right people to consent, because here the beneficiaries, they don't have any --

THE COURT: So who were the majority shareholders of the relevant Eber entities at that time -- at that time that that occurred?

MR. HERBERT: Well, the majority shareholder of Eber Bros. & Co., Inc., the top company, was the trust. And the majority shareholder of Eber Wine & Liquor was Eber Bros. & Co., and on down the line. So it was all a majority-owned chain. So the trust at the top layer, you know, as a majority shareholder, they have a fiduciary obligation, you know, not to do something unfair or abusive to the companies down below and to their minority shareholders, particularly when one of the minority shareholders, Peter Goodman, owned the 15% of Eber-Connecticut, and they had a preferred shareholder interest, which was basically superior to the equity interests of the beneficiaries.

THE COURT: Okay. So you're saying -- so is that ratification or approval then effectively the -- is that viewed, properly viewed as consent?

MR. HERBERT: Well, I mean, you know, what's a consent. I mean, if you look at some of the other cases that are cited here, the *Renz* case, the *Benedict* case, the [indiscernible] case, there's a lot of discussion in each of those situations between the fiduciary defendant and, in some cases, the beneficiaries, in some cases their co-executor that was involved in some of those cases. And it doesn't always say that there was some formal document that said Consent on top, but there was a lot of discussion and there was an awareness of what was going on, and those people either did or didn't sign off on whatever it is that was an issue in those cases. So I don't think there's any form or requirement that there has to be some document that says Consent on the top.

THE COURT: Okay.

MR. HERBERT: So I think the central issue on this consent thing, it depends on what's the -- you know, what's the deal here. You know, I know Mr. Brook has tried very hard throughout this whole case to segregate the foreclosure in 2012 from the rest of the loan transaction. We would very vigorously disagree with that, that the whole loan transaction and the security for the loan was all one integrated transaction, two sets of promises given in consideration for each other. And, yes, they were -- you

know, what's happened in connection with the loans was separated in time. But so what? So are all loans are made up year one and paid or repaid in, you know, year five or whenever. That doesn't make any difference.

But the important thing is the Security Agreement for Lester's loan very clearly permitted them to take whatever action was permitted under the Uniform Commercial Code, which is exactly what they did and exactly what they got the Supreme Court in Rochester to sign off on as being commercially reasonable. So, you know --

THE COURT: And the trust allowed loans and for collateral -- the companies to be put up as collateral for them?

MR. HERBERT: Absolutely. They know that. It really -- to be honest with you, the collateral here doesn't make that much difference, to be honest with you. You know, Lester, I guess he could have, you know, been an unsecured creditor here, you know, and I think that's something that this issue about what his other alternatives, and you can talk about this in another context, but, you know, the collateral here was to protect Lester from all the other creditors, not from the plaintiffs.

THE COURT: Yes.

MR. HERBERT: Because -- and the creditors, secured or not, he's always senior to all the equity holders of the borrower. But he may or may not be senior to, here, the New York State Teamster Fund and the PBGC. But that's --

THE COURT: Right.

MR. HERBERT: -- a [indiscernible] issue.

THE COURT: Right, right.

MR. HERBERT: I also should mention that --

THE COURT: Okay, so let me just restate your position. From your position, there really should not be any fiduciary breach found because the two independent -- because, one, the trust documents permitted this type of loan agreement; two, the independent trustees signed off on the agreement and ratified it and followed it; and the trust itself also had obligations to the companies, which had debts to other entities, like the PBGC and the union in connection with the whole pension debacle, and so it was not unreasonable to have this kind of loan transaction and ultimately, you know, what happened, what unfolded. Is that basically what you're arguing?

MR. HERBERT: Right. I think to put a little finer point on it, that the consent alone would have made this not a fiduciary problem for Lester. And --

THE COURT: Say that one more time?

MR. HERBERT: Well, if he had a valid consent, right, to the loan transactions, then that should be the end of the story there, right?

THE COURT: Yes.

MR. HERBERT: Separately, I think maybe our main argument is that the will authorized the loan transaction and all the incidents of the loan transaction and that that's -- that in and of itself will cause you to go to the next step, which would be that we would have to show at a trial that Lester acted in good faith. And I think that, as we mentioned in our papers, there's plenty of authority for that proposition.

You know, the issue here might be whether or not the foreclosure itself was authorized by the will language. I think we're -- you know, we've already accepted, everybody's already accepted that the loan was authorized, the security was authorized, the collection of the loan was authorized. The only thing we're arguing about now is whether or not this particular form of collection was authorized. And I think we would argue, and I think it's a matter of fact for a trial, that there really wasn't any other realistic alternative here. A public auction was not realistic, and it wouldn't have solved Lester's alleged

fiduciary problems with beneficiaries, anyway. And it probably would have destroyed the company. But those are all factual things that would be brought out at trial.

THE COURT: Okay. Okay. Thank you.

Mr. Ramsey, were there other points that you wanted to make?

MR. RAMSEY: Just briefly, your Honor, on the issue of the unwinding in a constructive trust.

THE COURT: Yes.

MR. RAMSEY: In our view, it's tough -- it's tough to see how a constructive trust would operate short of having the ownership/stock issue first determined as far as who's going to be operating. And, obviously, Mr. Brook's comments presupposed that it would be the plaintiffs. Until that determination is made, certainly we would object to that result.

And then just practically speaking, whether it's the plaintiffs operating it, whether it's some type of special master independent trustee, or whether it's a constructive trust and the current management and ownership stays on, the on-the-ground issues that they are going to cause, I just need to note those, whether it's the uncertainty for vendors and clients, the uncertainty that's going to cause with the banking and lending relationships.

I think -- I don't want to speak in hyperbole, but the imposition of a constructive trust at this point has the very real potential, if not likelihood, of imperiling the business, just given all of the new issues that would be injected into it at that point. So that certainly would not be a desired result from our perspective.

THE COURT: So let's just talk about this surrogate court -- the surrogate court order because in 2017 the trust dissolved. And it's ordered to be distributed per stirpes, right? So that's the order. And then there's an objection to that. Why, in your view, is the Court authorized to change what the surrogate court -- effectively change what the surrogate court has already determined?

MR. RAMSEY: John, do you want to jump in here?

MR. HERBERT: Again -- John Herbert again. Well, I think that their order, you know, it says what it says. But the implementation of their order -- right -- that's something that has to be done by the remaining trustee, Canandaigua. And I think, going back to a discussion long ago, they never did what they were supposed to do in order to get themselves into a position where they could require the issuer of the Eber Bros. stock to register or transfer into the names of the beneficiaries. They never did that.

I don't think anybody's claiming that they did.

THE COURT: You're talking about Lester and Wendy Eber didn't do what they needed to --

MR. HERBERT: No, no, no, no, no. As far as implementing the surrogate court's order, okay, that was up to Canandaigua to take the action necessary to get the shares transferred into the names of the three beneficiaries.

THE COURT: Right.

MR. HERBERT: Whatever they did in October of 2017, it wasn't valid. And I don't think that's an issue anymore. I think everybody agrees with that. And so if there was -- you know, whatever is necessary to be done in the future doesn't really have anything to do with the Lester Eber estate here. And so the plaintiffs' claim that somehow, you know, it requires action by them is just -- that's just not the case.

But I think maybe the more important issue is that, you know, our position is that Lester Eber timely exercised his right to call the shares of the plaintiffs away from them pursuant to the transfer restriction provision in the Eber Bros. bylaws. And that, you know, we say that that call right was validly exercised, and the posture of it now is that Canandaigua has just declined to

comply with the call rights, because they're kind of waiting for further instruction. Whether or not that was valid or not, you know, if there's another attempt to transfer shares to the three beneficiaries, the estate's going to exercise their call rights yet again, which they clearly have the right to do.

So I think there are a whole host of issues relating to the call right exercise in 2018 and any prospective call rights that the estate would have now. So --

MR. O'BRIEN: Your Honor, this is Dan O'Brien. If I may be heard?

THE COURT: Yes. I want to --

MR. O'BRIEN: And this --

THE COURT: -- I do want to hear from you. I just want to make sure that Mr. Ramsey and Mr. Herbert don't have any other points.

MR. HERBERT: I do have one other point that's important to note about the share ownership at Eber Bros. & Co., okay?

THE COURT: Yes.

MR. HERBERT: So let's just go over what the facts are here for a minute so you see the context. You know, the trust doesn't have any ownership interest in the Eber

Wine & Liquor at all. There's a fact issue about that, but they don't have any. But look at who owns what in Eber Bros. & Co. right now. Right now Eber Bros. & Co. is owned 62% -- well, if you were to distribute the shares to the three beneficiaries and you found that the call rights weren't validly exercised, then the plaintiffs here would have 62% of the votes, and the estate would have 38% of the votes.

THE COURT: Yes.

MR. HERBERT: Go down one level to the Eber Wine & Liquor subsidiary, right now Eber Bros. & Co. has 72% of those votes, and the estate has -- the Lester Eber estate has 27% of those votes. So on a fully diluted basis, in other words, if there was no Eber Bros. & Co. there, the Lester Eber estate would have 56% of the voting stock of Eber Wine & Liquor, and the plaintiffs would have 44%. So, you know, what's really going on here is that Lester Eber's estate actually on a fully diluted basis, they would have control of this business -- they should have control of this business; and, you know, to do something that thwarts that, that's just not fair to the Lester Eber estate, and we would certainly exercise our rights to, you know, pursue that claim. And I think we'd probably be seeking to forcibly dissolve Eber Bros. & Co. because it's not really

performing any useful function. It's just a block in the way of the estate exercising the voting control that they have on a fully diluted basis.

THE COURT: And Eber Bros. and -- okay, so you're saying Eber Bros. & Co. has a -- you're saying the estate through its ownership, it has 30% ownership in Eber Bros. & Co., which has a 72% interest in Eber-Metro, right?

MR. HERBERT: No, the -- no. If you look at Eber Bros. & Co. and Eber Wine & Liquor & Co. together as one, even if -- because they're really just two shell companies --

THE COURT: Well, let me -- I just want to understand this again, because I'm writing down the chart. We've got the trust on top; we've got Eber & Co.; then we've got the EBWLC --

MR. HERBERT: Right.

THE COURT: -- then we have the Metro, and then --

MR. HERBERT: Well, not anymore.

THE COURT: -- we have -- then Eber Metro, which then went to Alexbay?

MR. HERBERT: Correct, yes.

THE COURT: Okay. So take me through this again.

MR. HERBERT: Okay, so right now, the trust owns virtually all of the voting stock of Eber Bros. & Co.,

right?

THE COURT: Right.

MR. HERBERT: And then our position is that Lester Eber's estate has validly exercised its call rights and that they're the rightful owner to all of that. But even if you -- even if the call right wasn't defective and the shares currently held by the trust were distributed on a one-third, one-third and one-third basis, that would mean that the plaintiffs would have, you know, two-thirds, and at most you would have one-third. But because Lester's estate owns 27% of the vote in Eber Wine & Liquor, right, if you combine those two, that would result in the estate owning 56% of the votes. And they really are the ones that are entitled to -- even if you don't respect the call rights, the estate is the one entitled to have voting control of this whole structure.

Now, Mr. Brook's going to say, well, you know, he wants to contest the validity of the shares that were issued to Lester Eber by this Class B preferred stock of Eber Wine & Liquor, well, okay, we can have a discussion about that at trial. But, you know, net-net, the estate, you know, they've got effective -- owns an effective voting control of the structure here. And to strip that from them is, as I say, it's just not fair.

THE COURT: Okay. All right, so next I will hear -- Mr. O'Brien, you wanted to --

MR. O'BRIEN: Yes, your Honor --

THE COURT: -- I just want to give you an opportunity to --

MR. O'BRIEN: -- I'll be very -- I'll be very brief.

THE COURT: Yes.

MR. O'BRIEN: And I'm glad that you [indiscernible] you're providing additional details because the last question, which was regarding the impact on the surrogate court, the share distribution, suggested that I ought to be on the call. And I do want to say, you know, I don't necessarily agree that the estate failed to do what it was ordered to do because it was never given the stock ledger by Lester and could not distribute actual share certificates and therefore did the next best thing, which was to deliver the stock powers. Up until the surrogate court issued its order, Lester remained a trustee, as well, and therefore, he had an obligation to facilitate the distribution of the shares themselves. And to the extent we were not able to do so, then it's kind of disingenuous for Lester or now his estate to argue that somehow we failed to do what we were obligated to do.

That said, to the extent that there was anything that the bank didn't do that it was supposed to do -- I assume bring a proceeding to compel the delivery of the stock ledger so that we could issue actually certificates -- we settled this case with the plaintiff and, you know, took our lumps.

THE COURT: Right.

MR. O'BRIEN: We were brought back into the case, of course, because we had competing claims as to what we should do with respect to the issuance of stock, again, did not have the stocks ledger, and we had Lester demanding that we deliver the stock, and of course Brian Brook saying no, don't you dare. So that's why we got back into this. And I guess all I can say is we're prepared to do whatever the Court wants us to do. And, in fact, the prayer for relief in our intervenor -- Interpleader Complaint was we want the Court to adjudicate the issues with respect to the disposition of the stock and give CNB guidance and/or direction as to what steps, if any, CNB needs to take to implement the final determination of the Court in that regard.

And to the extent that the outcome of this case is that there has to be some different shared distribution formula because there was fraud or some other malfeasance,

then we will do whatever is necessary to seek a supplemental or amendatory determination from the surrogate, if that's what's called for.

THE COURT: I see.

MR. O'BRIEN: But I just wanted to --

MR. BROOK: May I respond to that, your Honor?

THE COURT: So -- in just a moment, but I just have a clarifying question for Mr. O'Brien. So is there a need for -- so if the bank were to have brought a Motion to Compel delivery of the stock ledger -- that was never done -- is there a separate claim? The claims are very convoluted, actually. This is a very complex web of transactions and companies. So I'm not clear on whether there's actually a claim asserted that would -- and maybe this is a question for Mr. Brook, really. What is the actual claim that would cause this Court to say there was a breach of -- that there was something -- something that requires the just delivery of the per stirpes as opposed to something else?

MR. BROOK: Yes, your Honor. So the -- the claim -- this goes to another point that was raised in the Motion for Reconsideration, which is, you know, if it's not presented in any other claims, it's certainly presented in Count VI seeking declaratory relief. And the declaration

of the plaintiffs' rights is something that, you know, would accomplish this, certainly. And we did move for summary judgment on that.

If this Court does stand by its decision to dismiss that claim, then, nonetheless, you know, it can only do that because it's duplicative. And how does the Court get to this question otherwise? It's because if it's -- it's necessary for plaintiffs to have standing to bring derivative claims. If they don't still have ownership of these shares, then they don't have a remedy. So the Court has to address it at some point. It's presented by the Complaint. It's essentially, you know, although not phrased this way, the Court could think of it as a defense that the defense has made, to try to say that my clients don’t have standing. And in order to address that, if not done as a declaration, this Court still needs to address it; otherwise, you know, what are we doing here.

So that's what I'd say to that, is that it's not -- you know, it's not a standalone claim in and of itself, but it is an essential element to numerous claims. And if the Court for some reason thinks that that's not necessarily decided, then it is explicitly in Count VI, as well.

THE COURT: So it's an element of other claims.

So, for example, is it in Count IV?

MR. BROOK: I say yes, it is an element in the sense that they're derivative claims; and, therefore, to establish a derivative claim, there must be -- in other words, to establish an injury, as well, it must establish that, you know, you have an ownership interest in the company that had the assets taken out of it. So either that's done through the trust or otherwise. So it's not a claim -- an element in the sense that if you look up "breach of fiduciary duty," it's listed as an element there; but as a practical matter, under these circumstances, it is a necessary fact to establish that my clients have, you know, an ownership interest in the company.

THE COURT: But, Mr. Brook, your clients never had an ownership. They were beneficiaries of the trust. It was the trust that had the ownership interest.

MR. BROOK: Right. And, your Honor, and so when the trust initially had -- when we first filed, it was a double-derivative claim in that they were beneficiaries of the trust, which has an ownership interest. And that is a -- you know, that gives them standing. So if this company was still owned by the trust and the trust were still in existence, my clients would have standing, no question.

The way in which the trust was dissolved and then Lester held back his supposed cooption or mentioning that or failing to mention any transfer restriction at all during the surrogate court proceedings, you know, if he'd done that, we wouldn't be here. My clients would have objected to whatever Lester was trying to do. But he bit his tongue on this.

You know, why is he raising this in October of 2018? You know, he received CNB's petition to terminate the trust, you know, almost two years earlier, didn't object to it, certainly knew what the distribution was going to be and then claims that somehow my sending him an email, you know, attaching a document, you know, when trying to just determine whether CNB ever actually delivered the stock powers, as it requested to do, you know, somehow they say that's the first time that Lester ever heard about this proposed transfer, which is ridiculous. You know, he had his counsel enter an appearance in the surrogate's court. He absolutely waived whatever rights he may have had. And even if he didn't waive whatever rights he had, let's keep in mind that he is, you know, purporting to acquire trust property, you know, that -- I'm jumping around a little bit.

I think ultimately we have a number of arguments

on this point in our motion papers; and, you know, part of our Motion for Reconsideration was simply that this Court, you know, resolve it. I think that, you know -- I don't --

THE COURT: But there was no affirmative -- there was no affirmative motion on Count IV. This issue of the ownership is certainly part and parcel of other claims, as you acknowledge. And there are so many interlocking issues here. Why isn't this case more appropriate to be resolved at trial with all -- why isn't it more efficient and appropriate to do that? Because it seems to me that there are many factual disputes that impact one another such that this case really needs to be resolved at trial as opposed to the papers. Why is that not so, Mr. Brook?

MR. BROOK: Well, your Honor, I would respectfully disagree that there are any factual issues here. Instead, it's merely a question of what are the legal consequences of the facts. You know, there's no dispute that Lester Eber received the surrogate court's petition and that he had counsel appear in that proceeding for him. There's no dispute that he did not state an objection. There's no dispute that he received CNB's proposed share distribution. There's no dispute that he received a proposed stock power. None of these facts are in dispute. And the arguments that we have presented to the Court are sufficient to say that,

given that those facts are not in dispute, there is no basis for Lester to claim that he could exercise a call option. And once this Court finds that the call option was, you know, waived by failing to raise it in a prior proceeding, you know, on the basic grounds of, you know, *res judicata* and other principles, you know, and estoppel -- my clients relied on his failure to object in agreeing to the termination of the trust. I mean, that's particularly significant here because as a trustee he had a duty still, until the trust was terminated, to inform my clients of all material facts. And he could not sit on these assertions that there was a transfer restriction.

It's also undisputed, your Honor, that the face of the stock certificate says that it says. This Court can interpret that. So there are numerous independently sufficient arguments based on undisputed facts that would resolve this issue in our clients' favor. And to have a trial and to delay things when there is no factual dispute to resolve, just a question of what the legal consequences are of those facts, I think would be, you know, unfortunately, wasteful and would, you know, really prejudice my clients, who have been very, very -- you know, they've been very eager to be able to move on with this thing and to get this over with. And particularly now --

and your Honor can correct me if I'm wrong -- but we wouldn't be able to get a trial date for, you know, ages under the current circumstances. So --

THE COURT: No, that's -- well, I don't know about that because I actually have a jury trial now scheduled for April, and I have a jury trial scheduled for June. The courts started having jury trials again, and so we are going forward with jury trials now. And --

MR. BROOK: Well, I certainly hope that's the case. I apologize --

THE COURT: Yes, so that's happening. So let me ask you, Mr. Brook, if the Court were to resolve the issue of the ownership of the stocks or force the ownership -- force the transfer of the stock so that your clients had two-thirds of the trust assets but did not resolve the other piece, that merely addresses portions of your -- eliminates standing issues and --

MR. BROOK: Yes.

THE COURT: -- but still potentially the issue -- it eliminates the standing issue, but it doesn't resolve other claims.

MR. BROOK: Yes, your Honor, that's right. But it is a necessary standing issue, I believe, just to unwind the Alexbay transaction and impose a constructive trust

because otherwise, my clients don't see any benefit from that. So I -- yeah, without current ownership of that, they would not -- and there's no point in, you know, giving judgment to someone without a benefit to it.

But the other claims that I mentioned would still be resolved. I do want to briefly address Mr. Herbert's assertion that, you know, Lester supposedly controlled the voting stock in Eber Wine & Liquor. That was some very confusing stuff he said that is just a total fabrication that ignores the reality of how corporate structures and subsidiaries work. It is not the case that Eber Bros. & Co., Inc. would vote its shares of Eber Wine & Liquor based upon who its shareholders are. Whoever controls the majority of Eber Bros. & Co., Inc. gets to control how it votes all of its shares in any subsidiary.

So, you know, the idea that Eber Wine & Liquor shares would be split on a pro rata basis is, it's just absurd. And I'm not sure if the Court was aware that -- you know, yeah, it -- I'm sorry.

Certainly, we contend that the issuance of preferred shares in Eber Bros. Wine & Liquor to Lester after this lawsuit was filed was another wrongful transaction. For one thing, it was more self-dealing by a trustee in a trust asset, shares in the Eber Wine & Liquor.

But even if that isn't overturned by the Court, the control of the company is done by Eber Bros. & Co., Inc. So whoever controls Eber Bros. & Co., Inc., boast all of its shares in a block, and that means that Eber Wine & Liquor would be controlled by my clients.

Now, one thing I do want to remind the Court of is that we submitted a proposed Order along with our Motion for Summary Judgment in part because we sort of saw this coming. It's like a, you know, constant -- it's like Whack-A-Mole; there's always new arguments coming up. Now, this is the first time in this entire case that I have ever heard from anyone on the defense that somehow Lester's estate would still control Eber Wine & Liquor even if get Eber Bros. & Co., Inc. That's brand new today.

And so we sort of anticipated this and said there needs to be a structured way in which the corporate transactions occur because the problem is the only officer of these companies now is Wendy, and she is not going to comply with anything of her own volition without very explicit instructions about how to do that. And I think ultimately, because the parties agree on how many shares should have been distributed under the surrogate court's order, you know, the only question is if Lester and Wendy can obstruct the implementation of that despite plaintiffs'

and Canandaigua's best efforts. I agree with everything Mr. O'Brien said. You know, they did the best they could, but when the company refuses to turn over the stock register and doesn't even tell them where to send stock powers to effectuate interests, it's the company and its officers that are obstructing, not CNB.

And so the idea that we would need to have some sort of a trial on who's at fault there in order to decide who owns the shares and whether they should have been distributed, that's wrong. We do acknowledge that there needs to be a trial on whether that was done with sufficient malice to warrant equitable indemnification because intent is not something that the Court can resolve at summary judgment. The legal effectiveness of what they're doing can be resolved, but not the intent, if that distinction makes sense.

So --

THE COURT: Okay. The Court is -- the Court could resolve the issue of what the bank needs to do with the shares and leave the rest for trial if it found that there were factual issues precluding summary judgment on the remaining issues, including the constructive trust, is that correct? Do you agree with that?

MR. BROOK: I'm not sure I understand what the

distinction is. What other issues --

THE COURT: In other words, [indiscernible] the decision of who owns or who gets the shares -- if your clients get -- if I were to order that your clients get two-thirds of the shares of the trust, period, end of story; but I found that there -- and just that, that doesn't impact the other claims. Am I correct?

MR. BROOK: It doesn't impact other claims, you're right, your Honor. I just wanted to make sure, so you're not -- you know, in order to get there, the Court has to find whether or not Lester's call option exercise was valid. So that just resolves that predicate issue that is necessary for everything else. So, certainly, the Court could resolve that issue now and leave other things for trial. You know, for reasons we've stated, plaintiffs don't believe that that should happen, certainly not with respect to some of the claims.

I think if the Court would like --

THE COURT: Okay. And then I -- I just have a question for Mr. O'Brien. So Mr. O'Brien, your client was a trustee, was it not, at the time that the foreclosure happened?

MR. O'BRIEN: We were a trustee at the time the foreclosure happened. We just did not know about the

foreclosure.

THE COURT: And -- you did not know about the what?

MR. O'BRIEN: Foreclosure.

THE COURT: Hold on a second. I thought I heard Mr. Herbert say that your client, the bank, as a trustee of the trust, agreed to the foreclosure in 2011. And he cited to a document where that -- the CNB00030.

MR. O'BRIEN: There are minutes of a trustees meeting at which the trustees agreed to the loan by Lester which provided the stock as security.

MR. HERBERT: But there was no consent to the foreclosure, your Honor.

MR. O'BRIEN: But we did not know of in advance and did not have an opportunity, therefore, to consent to the actual foreclosure.

MR. HERBERT: Nor was there an after-the-fact ratification --

THE COURT: Hold on. Hold on. First, I can only hear one person at a time, and you need to state your name for the record for the court reporter. So, Mr. O'Brien, I just want to --

MR. O'BRIEN: So do you want me to --

THE COURT: -- step back on that a little bit more

clearly because I thought I had understood that that document, CNB00030, was a consent by the trustees to the loan which also provided for foreclosure.

MR. O'BRIEN: Well, the loan documents obviously -- the loan documents provide for certain rights in the event of default. And the minutes of that trustees meeting reflect that those -- these are minutes that were prepared by Wendy, and I believe -- and agreed to by all of the trustees, including CNB. But it did not constitute notice that a foreclosure [indiscernible].

THE COURT: Okay.

MR. HERBERT: Your Honor, can I follow on that, just to clarify? John Herbert.

THE COURT: Hang on.

Mr. O'Brien, so are you saying that the bank did not have notice of the actual foreclosure proceeding and did not participate or separately consent to that proceeding; is that what you're saying?

MR. O'BRIEN: Right. And we were certainly not a party.

THE COURT: Okay. Now, Mr. Herbert, was that you seeking to clarify something about --

MR. HERBERT: Yes.

THE COURT: Okay.

MR. HERBERT: Well, two things. Number one, when I talk about the minutes of this meeting from August 18th of 2011, I did not say that the two independent trustees, Mike Gumaer and CNB, I didn't say that they consented to the eventual foreclosure. What this meeting was about was to go over the loan package, you know, what was it all about, what was happening with the property, what was happening with the status of the loans, and they asked the trustees to ratify the loans. But, you know, it wasn't -- the decision to go forward with foreclosure, it wasn't made for another six months after that.

THE COURT: Okay. All right.

MR. HERBERT: Can I also respond to what Mr. O'Brien said earlier?

I have to say that, with all due respect to Mr. O'Brien, I disagree with all of 99% of what he said. I thought we were way beyond the issues relating to all -- the stock book and all this nonsense from 2017. I think we very clearly showed -- and maybe it's still an issue -- there was no valid transfer of the certificates by CNB in 2017 because there was no physical delivery of the stock certificates to the beneficiaries. The fact that they delivered the stock powers to somebody, the UCC specifically says that's not effective to constitute a

transfer. And, you know, what's happening with the stock book of the company, that has nothing to do with anything. The point is that --

THE COURT: But, Mr. Herbert, your client, who was alive at the time, provided an obligation to provide the ledger and the certificates.

MR. HERBERT: No, he didn't.

THE COURT: Did he --

MR. HERBERT: No, he did not, your Honor. No, he did not. No, he did not. Let me explain that. There's no obligation on the part of the company to give anybody the stock ledger. That's just a list of who owns what shares. There's no obligation to give that to anyone.

And there's no obligation on the company's part to issue new shares to anybody unless the transferor and the transferee in the shares, whether they've gone -- you know, jumped through all the required hoops under Article 8 of the UCC, which they did not. And I don't even think that that's an issue that was still a factual issue. The point is they didn't do what they were supposed to do. I'm sorry.

And so -- but I don't even think that's the issue here. The issue here is whether or not Lester Eber's [indiscernible] exercised his call rights in 2018 and whether he could do so again now, you know. I suppose

Canandaigua could, you know, actually comply with Article 8 of the UCC; I suppose they could if they wanted to. It's not up to us to do that; it's up to the transferor to do that and the transferee. They're the ones that have to do the preliminary steps leading up to, you know, there being a requirement to register a transfer on the books of the company. And if they didn't do that, I'm sorry, but that's not our fault -- no offense, Dan.

THE COURT: Okay.

MR. O'BRIEN: Well, your Honor, I think that that's, you know, a little like the defendant who pleads guilty to patricide and then throws himself on the mercy of the Court because his father is dead.

The fact of the matter is that Lester was a trustee, he participated in the proceeding before the surrogate court and never took the position that the disposition of the stock -- remember, there was more than just disposition of Eber Bros. stock. In fact, the bank and Lester agreed that the bank would not be involved in the management of the closely-held company. But there were other publicly-traded stocks that were distributed amongst the beneficiaries of the trust.

THE COURT: Right.

MR. O'BRIEN: And there's no quarrel about that.

So the only stock that wasn't distributed was the stock that the bank did not have the ledger for and the certificates for. And Lester knew that, and I do think to have the complaint made now that the bank didn't do what it was supposed to do, I think it's a little disingenuous.

But, nevertheless, you know, we -- when we got a demand in 2018, we still couldn't provide the stock certificates because we did not have the stock ledger. And, in fact, at that point, I don't think we knew who had it other than we certainly suspected that Lester and Wendy Eber had custody and control of it. So that's why we had to come back to the Court because, certainly, Brian did not want us to do anything to facilitate the transfer of stock to Lester. We went back to Court and said please sort this out. And we'd be more than happy, if we had the stock ledger, your Honor, to deposit the stock certificates with the Court and have the disposition of those stock certificates determined ultimately when this proceeding is resolved. But we can't even do that because --

THE COURT: Well, why --

MR. O'BRIEN: -- we don't --

THE COURT: -- why shouldn't those stock certificates be placed with the Court now pending the outcome of this case?

MR. O'BRIEN: I'd be happy to have that happen because I think at that point in time we could make a hasty exit.

MR. HERBERT: Can I respond to that? John Herbert. Really, again -- I don't know how many times I have to go over this -- it doesn't have anything -- the stock register has nothing to do with Canandaigua. That's -- you know, what's happening with the stock register, what's happening with registering transfers, that's the job of the secretary of the company. The bank has nothing to do with that. They're not the transfer agent; they're just --

THE COURT: But the secretary of --

MR. HERBERT: -- a shareholder.

THE COURT: -- the company is a party to this case.

MR. HERBERT: That's correct. But the explanation, when Mr. O'Brien --

THE COURT: And why would -- why shouldn't this party to this case be required to put those certificates in the possession of the Court pending outcome of this case?

MR. HERBERT: Okay. Two reasons. Number one, the UCC has very specific requirements of what has to happen in order for the company to be required to issue new stock certificates to anybody. None of those prerequisites have

been satisfied. And, number two, Lester Eber's estate, our position is that he validly exercised his call rights in 2017 and will do so again, if necessary, in 2021. So it wouldn't be appropriate until we resolve all these issues that I just mentioned for there to be any certificates issued to anyone anywhere.

THE COURT: Okay.

MR. HERBERT: Because I know --

MR. BROOK: Your Honor, this is Brian Brook --

MR. HERBERT: -- the Court knows -- no offense -- no offense to Dan O'Brien, but I notice that he's not giving you any kind of technical analysis under Article 8 of the UCC at all.

THE COURT: Okay.

MR. BROOK: Your Honor, this is Brian Brook. May I briefly address this point?

THE COURT: Yes. I'll hear briefly from you, and then I think I -- my questions have been answered. Go ahead, Mr. Brook.

MR. BROOK: Well, your Honor, the Ebers are trying their best to make this issue of the stock certificates unduly complicated when the only question that should be resolved is whether Lester validly exercised his call rights. And that can be done based on the undisputed

facts.

Article 8 of the UCC, not an issue. Mr. Herbert argued that CNB didn't effectively transfer the stock. They made the same argument in their motion papers. There's no dispute about that. We conceded that. We said CNB did not transfer the shares under the UCC. The question is, you know, how are the shares supposed to be transferred, and CNB will do what needs to be done at that point. And the dispute, the purely legal one, is, you know, whether CNB had to deliver stock powers under the UCC before Lester's call right is even effected. And that is not what the bylaws say. The bylaws talk about notice being given before the transfer occurs, but Mr. Herbert points out delivering stock powers is effectuating the transfer. So it can't be the case that the notice and the transfer itself are the same. They're conflating two different things because that's their only defense, and they're grasping at straws. You know, there's numerous other reasons why it's ineffective, but whether, you know, the stock power constitutes a notice under the bylaws is just one.

You know, I also want to briefly address one other thing that's, you know, going back to Mr. Herbert's argument that the trustees ratified the loans. That has

nothing to do with the need for beneficiary consent. You know, they make this new argument at oral argument that the trustees consented enough to allow self-dealing. But that is absolutely not the law. This is more just grasping at straws. And, you know, moreover, the ratification of the loans, which were authorized by the will, is not the same thing as a ratification of the foreclosure. They do not argue that even the trustees ratified the foreclosure and said, you know, there's no dispute that CNB wasn't aware of that until after the transfer was essentially done. So that is ultimately what this comes back to is that beneficiary consent question.

You know, I think what's key here is the standard that is required. The Court asked is a second consent required, and the fact is they have to consent to any self-dealing that's not authorized by the will. And the only self-dealing that is explicitly authorized by the will is that Lester can make a loan to the company and have it secured. And there is some self-interest that's permitted under the will when it comes to decisions to retain the company. And that's really a key here because the will itself says that the trustees only have a duty of good faith rather than undivided loyalty when they make decisions to retain the business. And that makes sense

because Lester, as Allen Eber would have thought, Lester would have a self-interest in preserving his job, and he might even, you know, keep the company instead of selling it because he wants to keep working in it. And what Allen Eber said is as long as he's acting in good faith, he can do that. But it's really important that the will only makes that for decisions to retain, not to dispose of, which means the will clearly shows that any decision to actually dispose of the business for any reason is subject to the duty of undivided loyalty. And the duty of undivided loyalty and what constitutes consent, your Honor, has, you know, recognized the high bar there.

It is absurd to suggest that the language in the loan security agreement referring to Lester having all rights under the UCC was sufficient to give Audrey Hays and Sally Kleeberg any notice, let alone full notice, of Lester's possibility of taking ownership of the company. You know, even if it said that explicitly and it was buried in 40 pages of documents, you know, rather than being brought to their attention, that wouldn't be good enough. You know, I think it's correct that the law says there must be a clear, you know, and explicit consent. It doesn't necessarily have to be in writing, but there must be a consent. But certainly, it's absurd to say that there was

any close to full disclosure and that any reasonable juror could find that there was full disclosure of all material facts based on a cross-reference to the UCC that presupposes that my clients would then go read the UCC, understand it and figure out, you know, this is what a strict foreclosure is under Article -- what is it? -- 620 of -- Article 9, Section 620. That's just absurd. There's no need for a trial on that, your Honor. And that's all.

THE COURT: Okay, but Mr. Brook, it is not a surprise to you that the defendant's estate now has for the entirety of this lawsuit suggested that there was -- that Lester's sisters knew about the loan and consented to it when they --

MR. BROOK: That is what --

THE COURT: -- when they got the -- by virtue of the paperwork.

MR. BROOK: Yes. And there's no need for them to consent to the loan because that's authorized by the will, your Honor. So that's -- it's really a red herring. You know, the Court has already recognized that even the will authorizing the loan is not enough to authorize the foreclosure because, you know, among other things, there's other alternatives. But also, you know, as I pointed out, the language in the will draws a very, you know, distinct

difference between loans that are secured and decisions, you know, about the future of the company involved there.

So I think also the -- I'm sorry, now I'm losing my train of thought a little bit here -- but they alleged that, you know, that they had gotten notice of these loans, I think, largely because we alleged fraudulent concealment. And they're trying to say no, this was disclosed. But they never argued, until after the Court presented them with this option, that that was enough to kind constitute beneficiary consent.

And, again, I want to go back to what they said in their brief because they -- Mr. Ramsey misrepresented it as being that they said they didn't need the consent. But the exact words again were, "Lester does not argue that he sought, received or needed plaintiffs' consent to the 2012 foreclosure." So he does not argue that he sought or received the foreclosure. You know, that's --

THE COURT: All right --

MR. BROOK: -- and it makes sense because the standard for consent is so high.

THE COURT: Okay. I've heard enough. I'm going to take this motion under advisement. I want to thank the parties for being prepared today and wish you a good weekend. We are adjourned.

MR. RAMSEY: Thank you, Judge.

MR. BROOK: Thank you, your Honor.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Kleeberg et al v. Eber et al, Docket #16-cv-09517-LAK-KHP, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: March 29, 2021